

Supreme Court, U.S.  
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No. 86-1568  
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APR 29 1987

~~JOSEPH PANIOL, JR.~~  
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In the Supreme Court of the United States

OCTOBER TERM, 1986

HAROLD J. ROMAIN, PETITIONER

v.

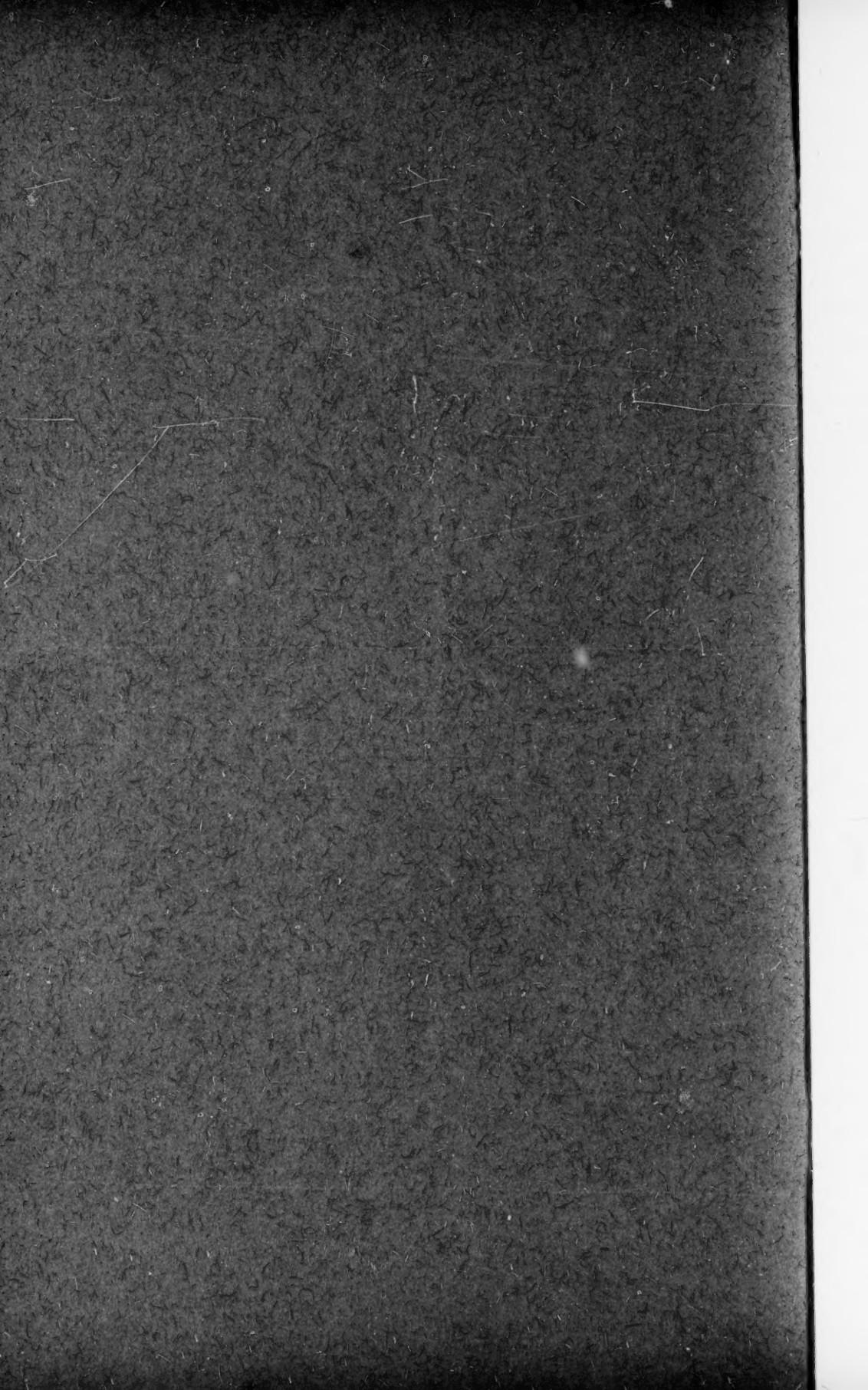
ADMIRAL HAROLD SHEAR,  
ADMINISTRATOR OF THE DEPARTMENT OF TRANSPORTATION,  
MARITIME ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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## MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner contends that the court of appeals erred in affirming the dismissal of his Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 633a, claims for failure to name the correct defendant.

1. Petitioner was employed by the regional office of the Department of Transportation's Maritime Administration in San Francisco until September 30, 1983, when he was dismissed pursuant to an agency reorganization and reduction-in-force (Pet. App. A2, B2). Petitioner appealed his dismissal to the Merit System Protection Board alleging, *inter alia*, that his dismissal amounted to age discrimination in violation of the ADEA (*ibid.*). The Board upheld the dismissal (*id.* at A2, B3). Petitioner received the Board's decision on May 30, 1984 (*id.* at B9 & n.3).

On June 29, 1984, petitioner filed a complaint that alleged violations of the ADEA and that named respondent, Admiral Shear, Administrator of the Department of Transportation, Maritime Administration, as the defend-

ant (Pet. App. A2, A4, B3, B5). On July 2, 1984, petitioner mailed a copy of the complaint both to Admiral Shear and to an individual attorney with the Maritime Administration. On August 13, 1984, petitioner served the United States with a copy of the complaint. *Id.* at B9.

The district court dismissed the ADEA claims on the ground that petitioner had failed to name the proper defendant, the Secretary of Transportation, within the thirty-day statutory period under 5 U.S.C. 7703 (Pet. App. B3-B11). The court held (and petitioner acknowledged) that the ADEA, like Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, requires that a complaint name "the head of the department, agency, or unit, as appropriate," as the defendant (Pet. App. B9, citing 42 U.S.C. 2000e-16(c)). The court rejected petitioner's claim that the Maritime Administration was the appropriate "agency" for the purposes of petitioner's lawsuit, ruling instead that the Department of Transportation was the appropriate "agency" and the Secretary of Transportation was the proper defendant. Pet. App. B4-B5. Applying Fed. R. Civ. P. 4(d)(5), the district court then rejected petitioner's claim that service upon a Maritime Administration attorney provided the Secretary of Transportation with sufficient notice (Pet. App. B7).

Finally, the district court concluded that petitioner's reliance on Fed. R. Civ. P. 15(c), to cure any defect in the complaint is misplaced. Rule 15(c) allows "[a]n amendment changing the party against whom a claim is asserted [to] relate[] back [to the date of original pleading] if \* \* \* within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced \* \* \* and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him." The court found that Rule 15 (c) does not

apply where, as in this case, "no notice of the action was given to the Secretary within the statutory period" (Pet. App. B8-B9).

The court of appeals affirmed (Pet. App. A2-A9). The court agreed with the district court that the proper defendant was the Secretary of Transportation and that petitioner had incorrectly named respondent, Admiral Harold Shear, Administrator of the Maritime Administration, as the defendant (*id.* at A3-A4). The court likewise rejected petitioner's claim that he should have been permitted to cure the defect by amending the complaint pursuant to Fed. R. Civ. P. 15(c). According to the court of appeals, Rule 15(c) does not apply because neither the Secretary of Transportation nor any "government official or entity was served within the thirty-day [statutory] period" (Pet. App. A3-A4).

2. The decision of the court of appeals is correct, does not conflict with any decision of any other court of appeals or of this Court, and further review by this Court is not warranted.

a. Petitioner contends (Pet. 6) that he did not name the wrong defendant in his complaint because the defendant in a civil action under the ADEA, unlike Title VII of the Civil Rights Act, need not be "the head of the department, agency, or unit" (*ibid.*, quoting 42 U.S.C. 2000e-16(c)). Petitioner, however, did not dispute in the district court that the proper defendant in an ADEA action is determined by the same statutory standard that explicitly governs Title VII (see Pet. App. B4). Nor did petitioner's brief in the court of appeals make that claim. Petitioners cannot therefore make that claim in the first instance in this Court. See *United States v. Lovasco*, 431 U.S. 783, 788 n.7 (1977).

In any event, the court of appeals correctly held that the Title VII standard for determining the proper defendant should apply in the context of the ADEA. As noted by the court of appeals, this Court has previously held that

"[w]hen a provision of the ADEA can be traced to a complimentary<sup>CSICJ</sup> section of Title VII, the two should be construed consistently" (Pet. App. A3, citing *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 756 (1979)). Portions of Section 15 of the ADEA, 29 U.S.C. 633a, which protects federal employees from age discrimination, were directly patterned after Section 717 of Title VII, 42 U.S.C. 2000e-16; (see *Lehman v. Nakshian*, 453 U.S. 156, 166-167 & n.15 (1981)). Hence, "the two should be construed consistently" (Pet. App. A3) and, in particular, the standard for determining the proper defendant should be the same.<sup>1</sup>

b. Petitioner further contends (Pet. 7) that pursuant to Fed. R. Civ. P. 15(c) he should have been permitted to amend his complaint to name the proper defendant, and to have the amended complaint relate back to the filing date of the original complaint. This claim lacks merit.

As the court of appeals held (Pet. App. A4-A5), Rule 15(c) is not available to petitioner because the proper defendant (Secretary of Transportation) did not receive "notice of the institution of the action" "within the period provided by law for commencing the action against him," as required by that Rule. The Secretary of Transportation was never served with a copy of the complaint and the

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<sup>1</sup> Petitioner erroneously contends (Pet. 6 n.3) that the court of appeals' decision conflicts with the Seventh Circuit's decision in *Ellis v. United States Postal Service*, 784 F.2d 835 (1986). In *Ellis*, the Seventh Circuit agreed that the Title VII standard should apply to the ADEA and never reached the issue whether naming the wrong defendant constituted a jurisdictional defect. The court merely noted that the district court had provided the plaintiffs with the opportunity to amend their complaint. The court did not rule that such an action was required. See 784 F.2d at 838. Petitioner's reliance on *Gillispie v. Helms*, 559 F. Supp. 40 (W.D. Mo. 1983), and *Bechtel v. United States Office of Personnel Management*, 549 F. Supp. 111 (N.D. Ga. 1982), is similarly misplaced. In both those cases, the plaintiffs had also named the correct defendant and the courts therefore only had to dismiss the actions against the incorrect defendants.

United States was not served until August 13, 1984, which was long after June 29, 1984, the date "provided by law for commencing [an] action against [the Secretary]" (see 5 U.S.C. 7703(b)(2); Pet. App. B9 & n.3). Contrary to petitioner's claim (Pet. 7), petitioner's pursuit of his administrative remedies in no way provided the Secretary with notice of the judicial action, as required by Rule 15(c).

Finally, petitioner's claim (Pet. 7), which he did not raise in the court of appeals, that an "identity of interest" between respondent and the Secretary saves his complaint, is unavailing. For, as in *Schiavone v. Fortune*, No. 84-1839 (June 18, 1986), slip op. 8, even if this Court were to adopt such an exception to Rule 15(c)'s literal terms, the exception would not apply in this case because "neither [respondent] nor [the Secretary] received notice of the filing until after the period of limitations had run" (slip op. 8). Copies of the complaint were not mailed to respondent until July 2, 1984, and, as described above, the United States was not served until August 13, 1984 (Pet. App. A4, B9).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED  
*Solicitor General*

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